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ALTERNATE DRAFT

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Ratesetting

Decision **ALTERNATE DRAFT DECISION OF COMMISSIONER KENNEDY**

(Mailed 8/1/2003)

(Revised 8/19/03)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SBC Pacific Bell Telephone Company (U 1001 C), a corporation, for Authority to Categorize Local DA Service as a Category III Service.

Application 02-07-050
(Filed July 31, 2002)

OPINION DIRECTING RESOLUTION OF THE APPLICATION OF SBC PACIFIC BELL FOR AUTHORITY TO CATEGORIZE LOCAL DIRECTORY ASSISTANCE AS A CATEGORY III SERVICE

This order sets the next steps for Commission resolution of the issues raised by the application of SBC Pacific Bell Telephone Company (SBC or Applicant) for authority to categorize local directory assistance (Local DA) service as a Category III service (Application).

Background

In Decision (D.) 89-10-031, we established three categories of local exchange carrier telecommunications services, ranging from monopoly services in Category I to competitive services in Category III. Category II, the current classification of Local DA, encompasses partially competitive services in which the incumbent local exchange carrier retains “significant (though perhaps declining) market power.” (1989 Cal. PUC LEXIS 576, *248)

Applicant (Pacific Bell at the time) had applied for¹, and was granted, an increase in Local DA pricing and a reduction of monthly call allowances. D.99-11-051 granted Applicant an increase of its Local DA tariff price and ceiling rate to \$0.46 per call and a reduction in the monthly free call allowance for residential customers from five (5) to three (3). SBC filed the Application on July 30, 2002 and according to Applicant, the market for Local DA in California has gone from partially to fully competitive during the intervening time period. Thus Local DA should be placed into Category III.

On September 5, 2002, the Application was jointly protested by the Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN). The protestors urged us to dismiss the Application or, in the alternative, to place it on a long calendar pending completion of other proceedings that consider closely related issues and involve many of the same participants.

The assigned Administrative Law Judge (ALJ) Karl Bemederfer conducted a pre-hearing conference (PHC) on November 19, 2002. Prior to the PHC, ALJ Bemederfer directed SBC, ORA and TURN to come to the PHC prepared to discuss whether the Commission should dismiss or defer the Application as urged by the protestors.

At the PHC, ORA pointed out that the Commission is currently conducting a review of the New Regulatory Framework (NRF), Order Instituting Rulemaking (R.) 01-09-001, and Order Instituting Investigation (I.) 01-09-002. Part of this review is an examination of the criteria that we should consider when evaluating applications to move services into Category III. For this reason, ORA

¹ A.98-05-038 Filed May 5, 1998.

and TURN believe that the Application is premature. SBC responded by arguing that NRF triennial reviews are more or less constantly ongoing and that the present review will not address a specific service such as Local DA.

ORA also pointed out that D.99-11-051 had established SBC's incremental volume sensitive directory assistance cost at \$0.33, a statement that SBC did not contest. Accordingly, ORA argued that SBC would suffer no financial loss if the Application were dismissed without prejudice or deferred to a later date. SBC responded that the purpose of the Application was not to raise prices but to permit SBC to offer competitive services without having to go through the lengthy process of gaining our approval. SBC views its inability to respond quickly to competitors as a harm it presently suffers. In response to comments by ORA and TURN, SBC denied that the Application would automatically lead to a price increase for Local DA but admitted that in those states where it has freedom to do so, it most commonly charges \$1.25 for a Local DA call, with no free calls.

In support of its claim that Local DA is a fully competitive service, SBC relied on the pre-filed testimony of its economic expert Dr. Jerry A. Hausman. Dr. Hausman's testimony emphasized the rapid growth of alternative sources of DA information such as free Internet-based directories; CD-ROMs; and competitive long-distance and wireless carriers. ORA questioned whether self-help, using a computer, phone book, CD-ROM or other means, was correctly considered part of the market for directory assistance. SBC conceded that market definition was a legitimate question but argued that it could only be answered if the Application were allowed to proceed.

Commissioner Wood, who was present at the PHC, found the Application deficient in failing to address the impact of moving Local DA into Category III on

low-income and foreign-language-speaking consumers, service quality and SBC's California workforce. In particular, he questioned whether low-income consumers would use directory assistance if the price per call were to increase to \$1.25 or \$1.50 and asked that the proceeding determine how many customers presently reach or exceed their call limit and whether customers are made aware that they may ask for multiple numbers on a single call.

Discussion

We believe that in its Application, SBC has provided substantial information that indicates that the market for Local DA in California has changed dramatically. Since the application has been protested and there are outstanding issues of concern that were voiced at the PHC, proceeding into the hearing phase will allow the Commission to receive additional information to establish what the current market conditions are and how Local DA service should be regulated. Also, the hearings will permit us to examine the impacts of re-categorization on customer classes. Therefore, in recognition that market conditions have changed, we conclude that the Application should move forward at this time for the reasons set out below.

A. Market Conditions and Competitiveness of Service

The Applicant has provided information through the Application and supporting testimony to show that the telecommunications market environment for Local DA has changed. This showing warrants the proceeding moving forward to assess its validity and to determine whether the Commission should move this service into "Category III." In order to meet the criteria for Category III classification, a local exchange carrier must "establish that it has or is expected to have insignificant market power in provision of the service in each market it intends to serve.

ORA correctly notes that the product and geographic markets have not been defined. At a minimum, we need to define the market for DA services. It is undisputed that directory assistance relating to telephones located within California can be supplied by operators located outside of California. SBC also points out that Local DA information can be obtained from a wide variety of sources, such as Internet-based directories, CD-ROMs and competitive long-distance and wireless carriers. Whether these sources are comparable substitutes for the Local DA service provided by SBC is a question to be explored in hearings. .”² In addition, we note that SBC’s application has provided little information on the prices and regulatory practices concerning local directory assistance in other states, which may provide key evidence on how this market responds to changes in regulation.

In SBC’s supporting testimony, it was stated that during the six-year period from May 1996 to May 2002, SBC’s share of the Local DA market decreased by 49.9%. This decrease in Local DA occurred even though line growth over the same period was 14.2%.

Allowing the proceeding to move forward will allow us to resolve the outstanding questions of market definition and market power and conclude whether Local DA service should receive Category III regulatory treatment.

B. Timing of Application

We recognize that the Commission and parties are faced with limited resources while tackling the numerous pending cases and proceedings, but the handling of proceedings is at the discretion of the Commission. We believe that

² CPUC Decision 89-11-031, New Regulatory Framework Decision

the Applicant has provided substantial evidence showing that the Local DA market environment has changed. This showing warrants the consideration of this Application by the Commission. The scope of this proceeding shall be established so that the necessary evidence on the specific service and market can be addressed, but at the same time, keep the scope narrow to avoid a lengthy and resource-intensive proceeding.

We note that there is a pending FCC proceeding that addresses new measures that may enhance competition for Local DA; specifically the role of pre-subscription to DA services. The current FCC proceeding is not specific to determining the competitiveness of Local DA service in California and does not address the pricing of Local DA services. The CPUC has jurisdiction over the ratesetting of this particular component, we can and should move forward and consider the Application at this time.

In addition, as part of this Commission's efforts to ensure that its regulations promote the public interest, including the California economy, employment and infrastructure, we need to determine what impacts a recategorization and change in price will have on the California economy in general, and in particular on the employment of those Californians who currently staff SBC's DA service centers. We note that in comments filed in this proceeding the Communication Workers of America (CWA) has raised the broad issue that failure to act on this application may cause financial and competitive harm to SBC. Although not explicitly stated by CWA, it is clear that this financial and competitive harm may lead to a loss of jobs for its members within California.

C. Impacts of Changing Local DA to a Category III Service

The Application requests for the re-categorization of Local DA from Category II to Category III, but does not address the impacts to certain classes of customers. Commissioner Carl Wood expressed concern during the PHC that the Application lacks the information on how the re-categorization will affect low-income and foreign-language-speaking consumers, service quality and SBC's workforce. The Greenlining Institute articulated similar concerns in its reply comments to the comments on the Draft Decision. Specifically, we must ensure that the re-categorization does not detrimentally affect customers in ways that countermand adopted social policies. SBC's current tariff exempts physically impaired individuals and businesses from Local DA charges.³ These exemptions are crucial to customers who are physically impaired and are unable to use a telephone directory due to visual or other physical limitations. Testimony and hearings will provide information on whether these exemptions should be maintained and also whether and what policies the Commission should adopt concerning specific customer classes.

D. Issuance of Scoping Memo

The Assigned Commissioner is directed to issue a scoping memo setting out the topics to be covered and a timetable for hearings within twenty-one days of the adoption of this decision.

Comments on Draft Decision

The alternate draft decision of Commissioner Kennedy in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7

³ SBC Tariffs Section 5.7.2 B.1 Exemptions.

of the Rules of Practice and Procedure. CWA, SBC, TURN and ORA (filing jointly) and Greenlining filed opening comments. SBC filed reply comments.

CWA provides comments supporting the alternate draft decision (ADD). In particular, CWA highlights the reasoning supporting the ADD, stressing that the 49.9% decrease in SBC's share of the directory assistance market is due to "the availability and accessibility of alternative sources of services." They provide a legal analysis supporting the conclusion that FCC action will not affect the Commission's jurisdictional authority over this matter. In addition, they believe that factual issues concerning potential loss of employment in California require Commission attention and resolution.

SBC supports the goal of the ADD to proceed, but argues that the application provides sufficient evidence to support reclassification without hearings.

ORA and TURN, filing jointly, argue that the Commission should not find that it is reasonable to consider this application and that the telecommunications market has change until they have an opportunity to cross examine witnesses. They argue that the ADD's findings constitute legal error.

Greenlining filed comments stating that there should be no hearing on the recategorization of directory assistance services unless the Commission has adequate resources to assess the impacts of recategorization on the "low-income, disabled, minority, senior and limited English proficient communities" that it represents.

In reply comments, SBC responds that ORA have failed to provide "any evidentiary support for the assertions in their protest or comments." SBC argues that the arguments of TURN and ORA make little sense. SBC states:

Addressing the Application on the merits is neither prejudicial nor would it violate due process. The proposed findings merely acknowledge that SBC California has submitted evidence that the market has changed. While they protested the Application, ORA and TURN have not presented any evidence to contest this showing. All they have done is claimed that the market changes are insufficient to justify recategorization. These arguments go to the merits of the Application, not whether it is reasonable for the Commission to consider the merits. (SBC, Reply Comments, pp. 3-4)

SBC further argues that the cases cited by TURN and ORA did not apply to this situation, which it characterizes as an interlocutory decision on whether to consider the application. Finally, SBC argues that Greenlining has not demonstrated legal error, but acknowledges that the matters raised by SBC can be addressed in evidentiary hearings.

We find little merit to the objection of ORA and TURN. The Commission, by its very nature, constantly monitors conditions in telecommunications markets. We would be remiss not to – indeed, statutes require an annual report to the legislature on the status of competition in California telecommunications markets.⁴ Thus, the Commission has a factual basis independent of the showing in this proceeding to determine that conditions in telecommunications markets have changed.

Moreover, as SBC has pointed out, the recognition that market conditions have changed does not prejudice this proceeding nor deny ORA and TURN any procedural rights. Indeed, we neither reached, nor reach today, any conclusion

⁴ See, for example, § 316.5 of the Public Utilities Code.

on the appropriate response to the changing conditions in telecommunications markets.

We also note that neither ORA nor TURN contested SBC showing, nor stated what it would show through cross-examination or new testimony. Thus, it is disingenuous to object to our acknowledging the substance of SBC's filing, which is all that we do. We do not shift the burden of proof – SBC must still show that there proposed recategorization of directory assistance meets the standards adopted by the Commission.

Concerning Greenlining's comments, we believe that we can successfully manage this proceeding to ensure a full examination of these issues.

Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Karl J. Bemederfer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Local DA is currently categorized as Category II.
2. The Commission last granted an increase in Local DA charges in November 18, 1999.
3. Circumstances in telecommunications markets have changed in ways that justify reviewing the categorization of local directory assistance service.
4. It reasonable for the Commission to consider resolution of the issues raised in this application at this time.

Conclusion of Law

The Application should proceed to formal resolution as dictated by the upcoming scoping memo.

O R D E R

IT IS ORDERED that:

1. The Application of SBC Pacific Bell Telephone Company for authority to categorize Local Directory Assistance Service as a Category III service shall proceed as dictated by the scoping memo to be issued.
2. A scoping memo is to be issued within 21 days of this order.

This order is effective today.

Dated _____, at San Francisco, California.